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In The

Supreme Court of the United States

October Term, 1995

JOAN FLYNN, ROBERT BERTERMANN, EVA CHRISTOPHERSON, SALLY GUZEK, PAUL ROSENQUIST, JAY WILDFONG, ED BOWMAN, SHIRLEY DANDENEAU, BONNIE FULLER, HELEN HESS, JOHN GRECO and JOSEPH PORCARO,

Petitioners,

vs.

DENNIS KORNWOLF and STEPHEN SIMANEK, in their individual capacities, and RACINE COUNTY, a municipal corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS, DENNIS KORNWOLF AND RACINE COUNTY, IN OPPOSITION TO GRANTING A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Racine County and Dennis Kornwolf believe that the questions properly before this Court are as follows:

1) Where state law provides that an employment contract which provides for employment for a specified duration creates a property interest, does a court order which appoints individuals as bailiffs and which has an expiration date for the court order create a property interest where the court does not provide for employment for a specified duration and does not expressly prohibit the court from terminating the bailiffs without cause?

2) If the Seventh Circuit erred in applying certain Federal case law in ruling that the court order here involved created no property interest of the Petitioners triggering due process protections, does such error warrant remand of this case to the Seventh Circuit for a reconsideration of such ruling?

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STATUTORY PROVISIONS INVOLVED

Wis. Stat. § 5.02(23)

> "State office" means the offices of governor, lieutenant governor, secretary of state, state treasurer, attorney general, state superintendent of public instruction, justice of the supreme court, court of appeals judge, circuit court judge, state senator, state representative to the assembly and district attorney.

Wis. Stat. § 751.02

> **Employes.** The Supreme court may authorize the employes it considers necessary for the execution of the functions of the supreme court and the court of appeals and the court reporting functions of the circuit courts and may designate titles, prescribe duties and fix compensation. Compensation and benefits of employes should be consistent with that paid to state employes in the classified service for services involving similar work and responsibility. Each justice and court of appeals judge may appoint and prescribe the duties of a secretary and a law clerk to assist the justice or judge in the performance of his or her duties. Each circuit judge may appoint a court reporter to serve in the court or branch of court to which he or she was elected or appointed if the reporter is certified as qualified by the director of state courts. A person appointed by the supreme court or a justice or court of appeals judge or a circuit judge serves at the pleasure of the court or the justice or judge.

Wis. Stat. § 753.10(3) (1991-1992).

> **Attendance of officers, pay; opening court.** (3) Unless otherwise directed by the presiding judge, no officer, other than the clerk, shall be paid for attending court or the judge if the court is not engaged in the trial of jury cases. Every officer attending court upon the order of the presiding judge shall have the same powers and authority as the sheriff, and shall be paid out of the County treasury, upon the certificate of the judge, compensation equal to that fixed by the County board. No such officer may be paid for any day when the court is not in session unless specially ordered by the presiding judge.

STATEMENT OF CASE

Respondents Dennis Kornwolf and Racine County adopt and incorporate herein Respondent Stephen Simanek's Statement of Case as set forth in his Brief in Opposition to Granting a Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

There are no compelling reasons why this court should grant a petition to review this case. Contrary to Petitioners' assertions, this case does not involve a federal question or a departure from prior decisions of this Court or any other court of appeals. In fact, the Seventh Circuit's decision was properly grounded on Wisconsin state law which is the only law that governs the outcome of this case.

Contrary to Petitioners' assertion that the Seventh Circuit based its opinion on "explicitly mandatory language", the court merely made a passing reference to that concept. Even if the court did refer to "explicitly mandatory language", this Court has made clear that although the concept has been abandoned in the context of prisoner litigation, it is preserved for use in other contexts involving the general public. Because this case involves the general public, there is nothing fatal about the Seventh Circuit's passing reference to "explicitly mandatory language" in its decision.

Furthermore, even if the Seventh Circuit misinterpreted Wisconsin law, it properly concluded that a court order is not a civil service regulation or law, contract or collective bargaining agreement. Finally, Circuit Court judges in Wisconsin are state employees and as such are not authorized to enter into employment agreements on behalf of the county.

ARGUMENT

I. CERTIORARI SHOULD BE DENIED BECAUSE THERE ARE NO COMPELLING REASONS FOR THIS COURT TO REVIEW THIS CASE.

Rule 10 of the Supreme Court Rules sets forth the considerations which this Court relies upon in determining whether to grant a petition for a writ of certiorari. A petition for certiorari will be granted only for compelling reasons. SCR 10. Rule 10 of the rules of this Court reads, in part:

A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the court's discretion, indicate the character of the reasons the court considers:

(a) a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important Federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this court's supervisory power;

. . . .

(c) . . . A United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

Petitioners put forth no compelling reasons for review of the Seventh Circuit's decision. There is no conflict between different circuits. This decision does not involve federal questions or a departure from prior decisions of this Court or any other court of appeals. The decision in this case rests solely upon the application of Wisconsin state law to an alleged termination of employment cause of action. For that reason, this court should decline to review this case.

II. THE SEVENTH CIRCUIT'S DECISION PROPERLY INTERPRETED AND APPLIED WISCONSIN LAW WHEN DETERMINING WHETHER PETITIONERS HAD A PROPERTY INTEREST IN THEIR EMPLOYMENT AS CIRCUIT COURT BAILIFFS.

The existence of a substantive property interest in employment is ordinarily a question of state law. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). The events giving rise to this litigation arose in Wisconsin, therefore, the law of that state applies.

"When called upon to decide the question whether an employee possesses a property interest in employment, Wisconsin courts have generally resolved the matter by providing a simple yes or no answer based on whether the employment is at will or for cause." *Fittshur v. Village of Menomonee Falls*, 31 F.3d 1401, 1405 (7th Cir. 1994). "Under Wisconsin law, employment at will is the rule. Absent civil service regulations or laws, or a contract or collective bargaining agreement, a municipal employee is an employee at will and has no property interest in employment." *Vorwald v. School Dist. of River Falls*, 482 N.W.2d 93, 96, *cert. denied*, ___ U.S. ___, 113 S.Ct. 378, 121 L.Ed.2d 289 (1992).

The Seventh Circuit properly interpreted and applied Wisconsin law in determining that Petitioners had no property right in their employment as circuit court bailiffs. It is clear from reading the decision of the Seventh Circuit that their decision was based on the fact that the petitioners were relying on a court order as opposed to a contract, collective bargaining agreement or civil service

regulations or laws. The Seventh Circuit began its analysis by noting that the court order lists the plaintiffs names and defines their authority and that *the order expires on December 31, 1993.* (Emphasis added.) The Seventh Circuit then proceeds to quote the sections of the *Vorwald* case that were cited above in this section. The Court then states that the "order appointing them to their positions did contain an expiration date" but that the order placed no substantive restriction on the county's or the appointing judges' authority to terminate the plaintiff before the court order expired.

It is clear that the Court of Appeals was addressing a court order which it did not consider to be a contract, collective bargaining agreement or civil service regulation or law. The Court of Appeals also found that the court order, although it had an expiration date, did not have a specific date for the termination of employment and did not have any other substantive restriction on the authority to terminate. This is clearly in conformance with Wisconsin law regarding employment at will. *See, Heinritz v. Lawrence University,* 535 N.W. 2d 81 (Ct. of App. 1995); *Forrer v. Sears, Roebuck & Company,* 153 N.W.2d 587, 589-90 (Wis. 1967).

Based on its correct interpretation of Wisconsin law and the above described analysis, the Seventh Circuit concluded that no property rights of the Petitioner were violated. For that reason, there is no basis for review by this Court.

III. THE SEVENTH CIRCUIT'S REFERENCE TO "EXPLICITLY MANDATORY LANGUAGE" WAS NOT FATAL TO ITS DECISION THAT THE COURT ORDER DID NOT CREATE A PROPERTY INTEREST IN EMPLOYMENT.

In its decision, the Seventh Circuit made passing reference to the fact that "[n]owhere does the court order state in 'explicitly mandatory language' that the appointing judges have limited discretion to terminate the plaintiffs' employment at the judges' will." The petitioners' whole argument for certiorari relies on the fact that the Seventh Circuit made this passing reference to "explicitly mandatory language". This reference is not fundamental or essential to the Seventh Circuit's decision. The sentence containing that phrase could easily be omitted from the order and not in any way change the validity of the Seventh Circuit's decision or the Seventh Circuit's correct conclusion based on Wisconsin case law, that no property interest was created by the court order.

In addition, when this court abandoned the use of "explicitly mandatory language" in the prisoner litigation context, it very clearly preserved its use in other contexts. Therefore, contrary to petitioner's assertion, there is nothing fatal about the Seventh Circuit's reference to "explicitly mandatory language" within the context of a property interest in employment. In *Sandin v. Conner*, 515 U.S. ___, 132 L.Ed.2d 418, 428, 115 S.Ct. 2538 (1995) (emphasis added), this court held:

> By shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation, the Court encouraged prisoners to comb

> regulations in search of mandatory language on which to base entitlements to various state-conferred privileges. Courts have, in response, and not altogether illogically, drawn negative inferences from mandatory language in the text of prison regulations. The Court of Appeals' approach in this case is typical: it inferred from the mandatory directive that a finding of guilt "shall" be imposed under certain conditions the conclusion that the absence of such conditions prevents a finding of guilt
>
> *Such a conclusion may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public. It is a good deal less sensible in the case of a prison regulation primarily designed to guide correctional officials in the administration of a prison.*

As indicated above, the Seventh Circuit's passing reference to "explicitly mandatory language" did not provide the basis for its decision that the court order did not create a property interest in the bailiffs' employment, and the use of the term "explicitly mandatory language" in and of itself does not jeopardize the Seventh Circuit's decision. For that reason, there are no compelling reasons for this Court to take this matter on review.

IV. EVEN IF THE SEVENTH CIRCUIT MISINTERPRETED WISCONSIN LAW, THE DECISION OF THE SEVENTH CIRCUIT WAS CORRECT.

A. The Seventh Circuit Properly Concluded That Under Wisconsin Law, A Court Order Is Not A Civil Service Regulation Or Law, Contract Or Collective Bargaining Agreement.

Even if the Seventh Circuit misinterpreted Wisconsin law as petitioners have alleged, there is still no compel-

ling reason for this Court to review this matter since the decision of the Seventh Circuit still is correct in that the petitioners had no property interest in their employment. There is no compelling reason to be served by having this Court review the Seventh Circuit's decision. Both the Seventh Circuit and District Court Judge Reynolds relied on *Vorwald v. School Dist. of River Falls*, 482 N.W.2d 93, 96, *cert. denied*, 506 U.S. 941 (1992). In that case, the Wisconsin Supreme Court held that "absent civil service regulations or laws, or a contract or collective bargaining agreement, a [public] employee is an employee at will and has no property interest in employment." *Id.*

District Court Judge Reynolds, in his decision, emphasizes that the plaintiffs were relying on a court order and that the *Vorwald* case clearly refers to contracts, collective bargaining agreements or civil service laws. Judge Reynolds held that the court order was not a contract. Judge Reynolds also held that the plaintiffs never used the word "contract" in their complaint and never claimed that they had a contract. Judge Reynolds' decision and the Seventh Circuit's decision upholding Judge Reynolds' order clearly were correct.

A court order is not a contract. The contracts and collective bargaining agreements that the Wisconsin Supreme Court refers to in *Vorwald* are documents that come out of bargaining between the parties. A contract is based on a mutual meeting of the minds as to terms manifested by mutual assent. *Goossen v. Estate of Standaert*, 525 N.W.2d 314 (Ct. App. 1994). Employment contracts and collective bargaining agreements are the instruments used when contracting parties wish to place

restrictions or abrogate the general employment-at-will rights of employers in Wisconsin. In *Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 269 (7th Cir. 1995), the court stated:

> Wisconsin has a strong presumption in favor of employment at will. *Forrer v. Sears, Roebuck & Company*, 36 Wis. 2d 388, 153 N.W.2d 587, 589-90 (1967). To overcome this presumption, a plaintiff must show that both parties intended to restrict the reasons for which an employee could be discharged.

Thelen makes clear that the court is to examine the intent of the parties and determine whether the parties intended to restrict the employer's rights to discharge an employee. In the context of a contract or a collective bargaining agreement, the parties can express their intent and they can clearly indicate that they are going to restrict employment at will. The same is not true in a court order. In this case in particular, the order entitled "Order Appointing Civilian Bailiffs", indicates that there were no parties before the court. This was an administrative order. *See State v. Cannon*, 221 N.W. 603 (1928). In issuing this order, the Circuit Court was trying to comply with § 753.10 of the Wisconsin Statutes which reads, in part:

> (3) Every officer attending court upon the order of the presiding judge shall have the same powers and authority as the sheriff and shall be paid out of the county treasury upon certificate of the judge, compensation equal to that fixed by the county board.

In appointing the bailiffs, the Circuit Court was merely designating those people who were authorized by

court order to be officers attending the court. This certainly was not a document which purported to show the intent of the parties and nowhere within the court order does it clearly indicate that there was an intent to restrict the general provision of employment at will. In fact, Sec. 751.02 Wis. Stats., which specifically addresses the Court's power to appoint law clerks and court reporters, provides in part:

> A person appointed by the supreme court or a justice or court of appeals judge or a circuit judge serves at the pleasure of the court or the justice or judge.

Petitioners have not suggested that the court could not have amended the court order *sua sponte* or rescinded the order since it was merely an administrative order. Just as the court's inherent authority allowed it to issue the original order that authority would allow it to amend or rescind the order.

The conclusion that the court order does not create any property rights is further reinforced by the fact that the order does not contain normal and essential employment terms. The order does not indicate a rate of compensation and does not indicate hours of employment. In fact, the order does not provide for any mininum number of hours at all for the bailiffs. The absence of these basic employment terms clearly demonstrates that this order was not meant to create any employment or property rights.

In fact, it was the county board that set the compensation rate of the bailiffs. (Petitioners' App. p. 42). As indicated in the petitioners' argument, these were not full

time positions. These were on call positions with no guarantee of any particular number of hours. (Petitioners' App. p. 4). The Racine Circuit Court Judges could have issued another order appointing additional bailiffs and used bailiffs exclusively from the second order. Nothing in the original court order or in the law required the local judges to use any of the petitioners for any specific number of hours. The above analysis demonstrates how different this court order is from the contractual arrangement contemplated in *Vorwald*.

B. The Circuit Court Judges Who Signed The Order Were Not Authorized To Enter Into An Employment Relationship On Behalf Of Racine County Because The Judges Are State Employees, Not County Agents.

The court order was signed by various state court judges. In Wisconsin, circuit court judges are not county employees. *Iowa County v. Iowa County Courthouse/Social Services Employees, Local 413, AFSCME, AFL-CIO*, 480 N.W.2d 499 (1992). Circuit court judges in Wisconsin are state employees:

> "State office" means the offices of governor, lieutenant governor, secretary of state, state treasurer, attorney general, state superintendent of public instruction, justice of the supreme court, court of appeals judge, circuit court judge, state senator, state representative to the assembly and district attorney.

Section 5.02(23) Wis. Stats.

Petitioners do not argue that the order in question made the Bailiffs state employees. Rather, petitioners

have always argued that the bailiffs were employees of Racine County. (Petitioners' App. pp. 38-42). In fact, a decision by the Wisconsin Department of Industry, Labor and Human Relations Employment Compensation Division, which the petitioners incorporated in their petition, found that the bailiffs were county employees and states as follows:

> Moreover, the services of the bailiffs accrued directly to the county and not to the state. The court served country [sic] cases. The supervision was done by county employes [sic]. The county board set compensation. The county executive ordered the layoff. The county personnel department provided the paychecks. (Petitioners' App. p. 42).

Clearly, the court order cannot reflect the intent of the parties, employer and employee, if the court order was issued by circuit court judges who were not agents of or authorized by the actual employer, Racine County, to enter into any kind of employment relationship with the bailiffs.

Because a court order in Wisconsin is not a civil service regulation or law, contract or collective bargaining agreement, the court order in question did not create any property rights in the bailiffs. Because the decisions of both District Court Judge Reynolds and the Seventh Circuit were correct, no purpose would be served by remanding this matter back to the Seventh Circuit.

CONCLUSION

Certiorari should be denied because there are no compelling reasons for this Court to review this case. The Seventh Circuit's decision rests solely upon the application of Wisconsin state law to an alleged termination of employment cause of action. Because the Seventh Circuit properly interpreted and applied Wisconsin law in this case, there is no reason to grant the writ of certiorari. The Seventh Circuit's passing reference to "explicitly mandatory language" was neither fundamental nor essential to its decision that the circuit court order did not create a property interest in the bailiff's employment. Even if the Seventh Circuit misinterpreted Wisconsin law, the court's decision was correct because a court order is not a civil service regulation or law, contract or collective bargaining agreement. Finally, Wisconsin circuit court judges are state employees and therefore cannot enter into employment agreements on behalf of a county. For these reasons, Racine County respondents respectfully request that the Court reject petitioners' request for a writ of certiorari.

Respectfully submitted,

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